FILED
APR 16 19
HAROLD B. WILLEY

IN THE

# Supreme Court of the United States

October Term, 1953

No. 868

SCHERING CORPORATION, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN MILTON
40 Journal Square
Jersey City, N. J.
RALPH BISGYER
Ring Building
Washington, D. C.
*Attorneys for Petitioner*

*Of Counsel*
MILTON, MCNULTY & AYRES
40 Journal Square
Jersey City, N. J.
DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY
100 Broadway
New York 5, N. Y.
IRVING H. JURON
*General Counsel*
Schering Corporation
Bloomfield, N. J.

WILSON - BYRD PRINTING CO. - NE 7-2323 - WASHINGTON, D. C.

## INDEX


| | PAGE |
|---|---|
| Citation to opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statute involved | 2-3 |
| Statement of the case | 3 |
| Reasons for granting the writ | 4 |
| 1. The directive is void for lack of jurisdictional findings | 4 |
| 2. Respondent was not empowered to direct an enemy national to license its patents to private individuals | 10 |
| 3. Respondent was not authorized to take property by exercise of the supervisory power | 12 |
| 4. The supervisory clause is unconstitutional because it furnishes no remedy against a supervisory order | 16 |
| Conclusion | 21 |
| Appendix A (opinion below) | 23 |
| Appendix B (pertinent legislative history of the First War Powers Act, 1941) | 24 |
| Appendix C (Form of Turnover Directive) | 26 |


### *Citations*

Cases:


| | |
|---|---|
| Atchison, T. & S.F. Ry. Co. v. United States, 295 U.S. 193 | 6 |
| Benintendi v. Kenton Hotel, 294 N.Y. 112 | 11 |
| Chicago, M. St. P.R. Co. v. Minnesota, 134 U.S. 418 | 19 |
| Codray v. Brownell, 207 F. (2d) 610 | 17, 20 |
| Dayton-Goose Creek Ry. v. United States, 263 U.S. 456 | 19 |
| Dollar v. United States, 190 F. (2d) 547 | 19 |
| Ex Parte Kumezo Kawato, 317 U.S. 69 | 20 |
| Federal Power Comm. v. Panhandle Eastern Pipeline Co., 337 U.S. 498 | 15 |

PAGE

Federal Trade Commission v. Bunte Bros., 312 U.S. 349 ..... 15
Frank v. Frank's, Inc., 9 N.J. 218 ..... 11
Guessefeldt v. McGrath, 342 U.S. 308 ..... 12
Hartman v. Federal Reserve Bank, 55 F. Supp. 801 ..... 17
Henkels v. Sutherland, 271 U.S. 298 ..... 12
Hunter v. Central Union Trust Co., 17 F. (2d) 174 ..... 9
Jackson v. Hooper, 76 N.J. Eq. 592 ..... 11
Kahn v. Schiff, 105 F. Supp. 973 ..... 21
Land v. Dollar, 330 U.S. 731 ..... 18
Land v. Dollar, 188 F. (2d) 629 ..... 18
Mahler v. Eby, 264 U.S. 32 ..... 4, 5
Olmstead v. United States, 277 U.S. 438 ..... 18, 22
Panama Refining Co. v. Ryan, 293 U.S. 388 ..... 5
Perkins v. Lukens Steel Co., 310 U.S. 113 ..... 9
Peters v. Hobby, 349 U.S. 331 ..... 5
Southern R. Co. v. Virginia, 290 U.S. 190 ..... 19
Stoehr v. Wallace, 255 U.S. 239 ..... 19
The Pietro Campanella, 47 F. Supp. 374 ..... 20
United States v. Lee, 106 U.S. 196 ..... 18
White v. Evans, 117 N.J. Eq. 1 ..... 11
Wichita R. & Freight Co. v. Public Utilities Comm., 260 U.S. 48 ..... 6
Zittman v. McGrath, 341 U.S. 471 ..... 14

Miscellaneous:

Brief No. 3, p. 33, 26 (filed by plaintiff-respondent in district court) ..... 11, 15
Brief No. 5, p. 14 (filed by plaintiff-respondent in district court) ..... 15
1st Ann. Rep't., A.P.C. March 11, 1942 to June 30, 1943, p. 19 ..... 7
Hearing Transcript Jan. 15, 1954, 2d folio, pp. 31, 188, 199 ..... 11, 14, 15
Trading with the Enemy Act, §5(b)(1) ..... 2, 13
Transcript of Argument in court below, pp. 36, 50 ..... 15, 16

Periodicals:

Administration of the Wartime Financial and Property Controls of the United States Govt., U.S. Treas. Rep't. Foreign Funds Control (Dec. 1942) pp. 28 ..... 17

PAGE

Byse and Bradley, Proposals To Amend the Registration and Prospectus Requirements of the Securities Act of 1933, 96 U. of Pa. L. Rev. 609..... 21

Douglas, Protecting the Investor, 23 Yale Rev. (N.S.) 521 (1934) ..... 21

Lobell, Revision of the Securities Act, 48 Col. L. Rev. 313 ..... 21

No. .....

IN THE

# Supreme Court of the United States

October Term, 1955

---

SCHERING CORPORATION, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the case of Herbert Brownell, Jr., Attorney General v. Schering Corporation on January 17, 1956.

## OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, filed on March 21, 1955 (App. 195a),[1] is reported in 129 F. Supp. 879. The per curiam opinion of the United States Court of Appeals for the Third Circuit is printed as Appendix A hereto and is reported in 228 F.(2d) 624.

---

[1] The Joint Appendix will be cited as App.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1) Whether a directive to execute an agreement, issued by the Attorney General under his "supervisory" power, to a domestic corporation, its directors and officers, is void for lack of jurisdictional findings responsive to the limitations imposed by the Executive Order which delegated authority to him.

2) Whether the Attorney General may direct an "enemy national" to give its property to private individuals.

3) Whether the Attorney General may take property by the exercise of the "supervisory" (i.e. regulatory) power, as distinguished from the "vesting" power, under the provisions of §5(b) of the Trading with the Enemy Act.

4) Whether said "supervisory" power is constitutionally invalid because said Act provides no remedy whereby relief may be sought by one injured by exercise of the power.

## STATUTE INVOLVED

Section 5(b)(1) of the Trading with the Enemy Act (as amended by the First War Powers Act, 1941, 55 Stat. 839), 50 U.S.C. App. Sec. 5(b), provides in pertinent part that

> "During the time of war or during any other period of national emergency declared by the President, the

President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise

* * * *

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

"by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, * * *"

## STATEMENT OF THE CASE

Petitioner is a New Jersey corporation engaged in the manufacture of pharmaceuticals. At the outbreak of World War II, its common stock and 42% of its preferred stock were owned by a German parent corporation. In 1942, the Alien Property Custodian vested the shares (App. 3a). Respondent succeeded him as shareholder, caused the Company to retire the preferred stock, and in March, 1952, sold the common stock at public sale for $29,131,960 (App. 3a). The sale was to investment bankers for resale to the public (App. 80a, 196a), and the shares were all purchased by American citizens (App. 87a).

Prior thereto, on January 5, 1952, and in contemplation of the sale (App. 3a; Respondent's brief in the court below, p. 37, fn. 43), respondent, purporting to act under

the Trading with the Enemy Act and as administrator of the vested stock, issued a Directive (App. 200a) addressed to petitioner and its board of directors, directing petitioner to execute the agreement in suit. Certain patents owned by petitioner were, by the agreement, transferred to the Attorney General, and certain others were required to be licensed by petitioner to any applicant (App. 3a-5a). It is stipulated that petitioner's officers and directors executed this agreement involuntarily, under compulsion and fear of imprisonment (App. 77a).

After the sale of the stock had been completed, a new board of directors declined to perform the agreement, believing it void for duress (App. 61a, 63a). Respondent thereupon brought suit to enforce the agreement, invoking 28 U.S.C. §§1345, 2201, 2202 and 50 U.S.C. App. §17 (App. 2a). Petitioner, in its answer, pleaded illegality and unenforceability by virtue of duress, and in its counterclaim sought to have the agreement set aside and its title to all of the patents confirmed. Respondent's motion to dismiss the counterclaim was granted by the district court, and a final order was entered requiring petitioner to perform the agreement. The Court of Appeals affirmed.

## REASONS FOR GRANTING THE WRIT

### I

### The Directive Is Void for Lack of Jurisdictional Findings

The decision of the court below is in direct conflict with the decisions of this Court holding that administrative orders which lack jurisdictional findings are void. *Mahler* v. *Eby*, 264 U.S. 32. For respondent's Directive lacks such findings and therefore should have been held void. Executive Order No. 9193, whereby the President

delegated certain powers to the Alien Property Custodian, predecessor of the Attorney General, provides in par. 10(a) that

> "persons *not within* designated *enemy countries* • • • shall not be deemed to be nationals of a designated enemy country *unless* the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of [an enemy country or national]; • • • or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country." (App. 126a-127a). (Emphasis added throughout.)

Schering, a domestic corporation, was *not within* a designated enemy country; consequently findings responsive to the requirements of clauses (i) or (iii) were mandatory. No such findings are contained in the Directive. Limitations imposed by an Executive Order are jurisdictional. *Peters* v. *Hobby*, 349 U.S. 331, 345. When the President delegates his authority by Executive Order, an exercise of the power must be grounded on findings responsive to the limitations there imposed.

The district court[2] first excused the absence of findings on the ground that petitioner had "notice" of the underlying facts and "was in no way misled" (App. 229a-230a). The findings doctrine, however, is not predicated on notice but on "general principles of constitutional government", on the fact that there is an exercise of "delegated legislative power." *Mahler* v. *Eby*, 264 U.S. 32, 44. Without the findings requirement, an administrator would have "unfettered discretion as the qualification of authority would be ineffectual." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 431.

---

[2] We refer throughout to the district court opinion because its conclusions and analysis were adopted by the court below.

Next, the district court relied on the mention of prior vesting orders in the Directive (App. 238a). But there was no *express* incorporation by reference of the *findings* contained in those vesting orders; the vesting orders were merely mentioned. *Wichita R. & Freight Co.* v. *Public Utilities Comm.*, 260 U.S. 48 had held, said the Court in *Mahler v. Eby, supra,* that where

> "a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act",

and that the relevant order

> "was void for lack of the express finding in the order."[3]

That each administrative order must be self-sufficient is attested by respondent's invariable practice with respect to Schering itself. Each of the five vesting orders which follow the first Schering vesting order (App. 233a, 131a-144a) contains completely independent jurisdictional findings. Respondent's scrupulous adherence to self-sufficient orders testifies that *each* administrative order must contain jurisdictional findings, and that this requirement is not administratively impracticable.

Consider the consequences of a different rule in the context, for example, of the Interstate Commerce Commission practice. Although the Commission had repeatedly found a motor carrier "fit, willing and able" to perform proposed services and although the carrier was notoriously successful, is it conceivable that the Commission would be allowed to dispense with a fresh finding to this effect when the carrier applied for still another route extension? 49 U.S.C. §307. Certainly it never has done

---

[3] The Court has since
"repelled the suggestion that lack of express findings by an administrative agency may be supplied by implication." *Atchison, T. & S.F. Ry. Co.* v. *United States*, 295 U.S. 193, 202.

so; each new route authorization stands on its own bottom.

To rely, without incorporation by reference, on findings made in earlier orders, would foster disregard of jurisdictional limitations and breed chaos. Who could ascertain, upon reading an order in the Federal Register, whether it was legally sufficient or insufficient? Courts require self-sufficient counts though they are contained in one and the same pleading. On what theory is less to be required with respect to administrative orders that are scattered throughout the volumes of the Federal Register?

The requirement that every order be self-sufficient is especially important when the prior orders issued under an entirely different power. As the prior orders were all vesting orders, they issued under the "vesting" authority conferred by § 5(b) of the Act. The Directive, however, was purportedly issued under the "supervisory" authority. Respondent and his predecessors, however, have never relied on an exercise of the vesting power to confer supervisory (i.e. regulatory) jurisdiction,[4] under which the Directive issued. They have vested stock from shareholders by vesting order and have taken "supervision" of the corporation itself by *supervisory order*. See Vesting Order No. 168 and Supervisory Order No. 20, issued in the same case (App. 190a, 114a). Each such order contained independent jurisdictional findings.[5] Even

[4] For the jurisdictional difference between the vesting and supervisory powers see infra, 12-13.

[5] At a later date it became the "practice of the Office to incorporate the supervisory order in all vesting orders affecting enemy interests in business enterprises." 1st Ann. Rep't., Alien Property Custodian, March 11, 1942 to June 30, 1943, p. 19. For examples of such incorporation, which thereby gave a jurisdictional basis for the exercise of "supervision", see App. 144a, 148a, 151a, 153a, 158a, 161a. No such incorporation of a "supervisory order" is to be found in any Schering vesting order. Respondent's own documents show that no supervisory order ever issued. App. 88a, 84a, 93a, 96a. In a word, no proper basis was ever laid in

where he sought to supervise an individual whose property had been vested, respondent published an amendment, expressly incorporating the taking of "supervision" into his prior vesting order (App. 169a, 171a, 165a). By his own testimony, therefore, issuance of a vesting order does not absolve him from taking "supervision" expressly and making independent jurisdictional findings.[6] Had he properly taken "supervision" in any prior order there might possibly be a basis for arguing that fresh findings were unnecessary for each new exercise of the supervisory power, although that argument would collide with respondent's own practice to the contrary in this very case—he repeatedly made independent findings upon each fresh exercise of the vesting power.

In the courts below, it was argued that there was supervision in fact and hence there was no need for an order or findings. Acceptance of this argument would gut the whole findings requirement. It would make possible the very "unfettered discretion" that findings are designed to avoid. Who would pause to make findings which can be judicially reviewed if one can safely act without them.

---

this case for the exercise of the supervisory power. And the Directive itself fell short of serving as a "supervisory order" because it lacked jurisdictional findings.

[6] The district court erroneously found that the Custodian had taken "supervision" by his Order No. 2 (App. 238a-239a). That Order mentioned the earlier Schering vesting orders and stated that the Custodian

> "has assumed supervision * * * pursuant thereto and by virtue of Gen. Order No. 31." (App. 87a)

Since the vesting orders nowhere refer to the taking of "supervision", he had not thereby "assumed supervision". General Order 31 (App. 172a) *prohibits*

> "All transactions by, or with * * * any business enterprise of which the Alien Property Custodian has *undertaken the supervision*, or which he has vested."

Thus the Order itself shows that it applies where the Custodian has already "undertaken supervision" of an enterprise; it was designed to "prohibit" transactions by "supervised" enterprises, not to "assume supervision" of them.

No, findings are the precondition of administrative action and without them administrative action is invalid.[7]

We submit that in insisting on findings "in the record of the act", in repelling the substitution for express findings of findings "by implication," supra, p. 6, this Court has required self-sufficient orders. This case represents the solitary deviation of respondent from that requirement and in condoning that departure the decision below is in conflict with the decisions of this Court.

Against this, respondent argued in the court below (Brief, p. 31) that petitioner could not insist that its "superior comply with 'administrative law' in issuing orders", citing *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127. It was there held that historically the administration of the government's "purchasing machinery [must] be unhampered" (310 U.S. at 130), that one who shows "no more than a mere possible injury to the public" (id. at 132) cannot complain of administrative interpretations, and that

> "The act does not represent an exercise by Congress of regulatory power over private business or employment." (id. at 128)

Hence it was held that would-be sellers of supplies to the government could show no "legal right" to review of an administrative interpretation of that Act. Here, however, a federal officer is seeking to enforce a contract procured under duress against a "private business", the object of which is to take property from it. Respondent himself stated in the court below (Brief, p. 37, fn. 43) that

> "when the contract is entered into with a corporation *with a view to a contemplated sale* of its stock,

---

[7] "such determinations are prerequisites to the seizure whether the seizure *be actual* or symbolical" [i.e. by World War I "demand" or World War II "vesting order"]. *Hunter* v. *Central Union Trust Co.*, 17 F. (2d) 174, 178.

> the interests of the corporation may be measured after the sale by the interests of the third parties into whose hands the stock passes."

"Measured" by the interests of the Americans who bought the shares from respondent, the threatened deprivation immediately imperils their "legal rights." The American purchasers from respondent are therefore entitled to insist that a contract which was designed to affect them be made in compliance with law. To extend the area in which federal officers are free from judicial check beyond the "public contract" situation of the *Lukens* case is to invite arbitrary rule and lawlessness in an ever expanding federal domain.

We submit that each administrative exercise of delegated power must show on its face that it responds to the limitations imposed on the delegated authority and that respondent's Directive was void for lack of such jurisdictional findings.

## II

### Respondent Was Not Empowered to Direct an Enemy National to License Its Patents to Private Individuals

One portion of respondent's Directive ordered petitioner to license certain of its pharmaceutical patents to all applicants. In sustaining this order, the court below decided an important question of federal law which has not been, but should be, settled by this Court.

The object of the Trading with the Enemy Act was the seizure of enemy property by the government, not to enable the Custodian to compel enemies to make gifts of it to individual Americans. There is not the slightest intimation in the statute or its legislative history that the Custodian is authorized to order enemies to transfer their property to private persons. It is scarcely neces-

sary to dwell on the evils that could flow from recognition of such a power, the enrichment of spoilsmen, the diversion of enemy property from the government. And should Congress later conclude that enemy property should be returned, the gifts to private persons might well prove irreversible. To read into the statute an authority to compel enemies to transfer their property to private individuals is to subvert its basic purpose. And this in a situation where respondent confessedly had feasible alternatives. He conceded in the district court that he could have vested the patents,[8] whereupon he himself could have issued licenses. He likewise there conceded that he could have voted to liquidate the company and have the patents distributed to himself.[9] Or he could have elected directors who shared his views and required no coercion.[10] With these alternatives available to respondent and to future administrators, there is scarcely need to warp the law in such dangerous fashion.

---

[8] Hearing Transcript, January 15, 1954, 2d folio, p. 199.

[9] Brief No. 3, p. 33 (filed by plaintiff-respondent) in the district court.

[10] We reserve the question whether respondent was authorized, as a shareholder of a New Jersey corporation, to constrain the board of directors. The district court erroneously held that he had such powers; the court below did "not disagree" but found it "unnecessary to adopt" that view (Appendix A, p. 24). In New Jersey, two directors holding all of the stock cannot control directorial discretion because that would render "void the authority of the legislature", which has confided management exclusively to the directors. *Jackson* v. *Hooper*, 76 N.J. Eq. 592, 75 Atl. 568, 573. This is the universal rule. The district court distinguished it by identifying corporation and shareholder, an identification made in New Jersey solely to prevent fraud as to third parties. *Frank* v. *Frank's Inc.*, 9 N.J. 218, 87 A. (2d) 724, 727. See also *White* v. *Evans*, 117 N.J. Eq. 1, 174 Atl. 731. Why, indeed, should equity relieve a shareholder from compliance with a statute which he disobeys in the presence of lawful alternatives? Cf. *Benintendi* v. *Kenton Hotel*, 294 N.Y. 112, 118, 60 N.E. (2d) 829.

## III

### Respondent Was Not Authorized to Take Property by Exercise of the Supervisory Power

Respondent's Directive also ordered petitioner to transfer certain of its patents to him. Read literally, the Act does provide that respondent may compel a transfer. But a literal reading [11] makes meaningless a statutory scheme which sharply differentiated between vesting and supervision, and moreover would authorize confiscation of constitutionally-exempt American interests (*Henkels* v. *Sutherland*, 271 U.S. 298, 301), a result which Congress plainly sought to avoid.

The usurpation of powers by the chief law officer of the United States without more presents a question of transcendent importance. Its importance is heightened by the fact that a considerable body of foreign property remains "frozen" and that claims of Americans and "non-enemy" aliens to interests of one kind or another in such frozen property are without any remedy. Today, with war clouds ever over us, "freezing" controls may at any moment be extended and these powers once again exercised to the detriment of still other Americans. See *infra* p. 17.

We begin with the statutory differentiation between the "vesting" and "supervisory" powers, from which it will appear that respondent was without power to *take* property by a directive issued under the "supervisory" power because Congress limited the *taking of property* to the narrowly confined "vesting" power. The first clause of §5 (b)(1) deals with the so-called "freezing" and "su-

---

[11] Because the 1941 amendment to §5(b) of the Act was hastily drafted immediately after Pearl Harbor, this Court emphasized that

> "the legislation was a makeshift patch work. Such legislation strongly counsels against literalness of application." *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319.

pervisory" powers. It provides in pertinent part that the President or his delegate may

> "investigate, *regulate, direct and compel,* nullify, void, prevent or prohibit, *any* acquisition, holding, withholding, use, *transfer,* • • • or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property *in which* any foreign country or a national thereof *has any interest,* by any person, or with respect to any property, subject to the jurisdiction of the United States;"

A further clause then confers the "vesting" power:

> "any property or *interest of* any foreign country or *national* thereof *shall vest,* when, as, and upon the terms, directed by the President, in such agency or person as may be designated • • • by the President • • •."

Thus §5(b) sharply distinguishes between the *vesting* power, which is confined to "property or *interest of* any foreign country or national", and the *regulatory* (i.e. *"supervisory" and "freezing"*) power, which extends to "any property *in which* [a foreign national] has any interest." Concretely, only the foreign "interest" in property intermixed with American interests may be vested; but the entire complex *"in which"* foreigners have an interest may be "frozen" or "supervised", if literal effect be given the statutory language. Having limited vesting of property to the *"interest of"* a foreign national, Congress scarcely intended to nullify the *limitation* by authorizing the Attorney General to "compel the transfer" to him of "any property *in which* any [foreign national] has any interest."

To disregard the limitation, moreover, is to authorize the seizure of property owned by Americans. Now the Congress was repeatedly assured in unmistakable terms that the 1941 amendment to §5(b) had no applicability what-

soever to American interests. See Appendix B hereto. Nevertheless, respondent unabashedly laid claim to power over Americans in the district court. Referring to the words "direct and compel" in the "supervisory" clause of §5(b) counsel for respondent contended that:

> "This power would permit * * * a direction to the Board of Directors of General Motors to transfer enormous plants, let us say, because—and because alone one stockholder owning one share of stock in General Motors was a foreign national, literally speaking, and I am putting that to show what I believe to be the literal meaning of those words." Hearing Transcript, Jan. 15, 1954, 2d folio, p. 31.

The astonishing sweep of this claim emphasizes the need for rejecting a literal reading which repudiates the repeated assurances to Congress that the 1941 amendment to §5(b) left American interests altogether untouched.

The fact that the phrase "compel any transfer" was not designed to accomplish a taking of title is confirmed by the unvarying administrative practice of respondent and his predecessors. Since 1942, when the Alien Property Custodian's Office was revived, the Federal Register shows that *all* of some 14,000 transfers of title and possession to the Custodian were accomplished by vesting orders, *never* by supervisory orders or directives. In the court below respondent challenged this assertion, saying that "in a sizeable number of cases the Custodian took over property by a 'turn-over directive'" (Brief, 19). But the standard "form" used for such directive (printed in Appendix C hereto) plainly discloses that it was only employed to direct a turn-over of property that had *first been vested by a vesting order.* Cf. *Zittman* v. *McGrath,* 341 U.S. 471. Indeed, respondent conceded in the district court that

> "the Attorney General does not seize or vest prop-

erty by means of directives • • •". Brief No. 5, p. 14.[13]

This undeviating practice for more than ten years constitutes an administrative recognition of the fact that the Custodian was not authorized to transfer title and possession to himself by an exercise of the *supervisory* power. In a similar case, this Court said that

> "for over 10 years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed." *Federal Power Comm.* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513.[15]

During the argument before the court below, counsel for respondent confessed to being "bothered" by the fact that a *taking* by directive "has never been done before." (Transcript of Argument, p. 36).[14] What really "bothered" re-

---

[13] He also distinguished between "a vesting order which confers possession of and possessory title in specific property" and "a supervisory order which confers the power of regulation of an enterprise . . .". Brief No. 3 in the district court, p. 26.

[15] "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351-352.

[14] He professed to find an "answer" in the "fact" that Vesting Order 18,685 had already vested the "right, title and interest" of German Schering in the patents, id. at 37, and that the Directive merely ordered the turn-over of already-vested property. But a "turn-over directive" always expressly refers to the prior vesting order (see Appendix C hereto) whereas the present Directive makes no mention of V.O. 18,685. Moreover, respondent stated in the district court that he *could* have vested the patents (Hearing Transcript, Jan. 15, 1954, 2d folio, p. 199), thereby conceding that he had not. Had V.O. 18,685 in fact vested the patents as German property, the entire elaborate argument in both courts below on the scope of "compel a transfer" would have been superfluous, because petitioner has never questioned that the patents which

spondent's counsel was the lack of power confessed by respondent's unvarying administrative practice, which responded to the statutory differentiation between vesting and "supervision". It should have "bothered" the court below.

When the taking of title is read out of the words "compel any transfer", respondent is not deprived of a necessary power. Title to enemy property can still be, as indeed it always has been, taken by vesting order. If "compel any transfer" goes beyond this, it is a dangerous joker which would permit respondent, as he claimed in the district court, to seize General Motors' plants. This claimed power constitutes an omnipresent threat which this Court should remove.

We submit that the power to take title by "directive" was denied by virtue of the statutory limitation of vesting to enemy property, a limitation that is confirmed by respondent's invariable practice of confining the taking of title to vesting orders.[15]

## IV

### The Supervisory Clause Is Unconstitutional Because It Furnishes No Remedy Against a Supervisory Order

The "supervisory" power is unconstitutional because no remedy whatsoever is provided to review its exercise.

---

respondent sought to take by Directive could have been vested, and that a "turn-over directive" may issue with respect to *vested* property. The fact is, as the court below was immediately informed, German Schering had no interest whatsoever in the petitioner's patents and V.O. 18,685 was merely a final precautionary measure to cut off any possible, even if remote, claim of German Schering to the patents of its former subsidiary. Transcript of Argument, p. 50. For V.O. 18,685 see App. 136a.

[15] This is, of course, not a mere matter of labels attached to orders, but of identification of a power which, in the case of the "supervisory" power, cannot be and never was used for the taking of title.

In holding to the contrary, the court below decided an important question of federal law which has not been, but should be, settled by this Court. The general importance of the question may be gleaned from Treasury Department statements:

> "many of our own citizens have been declared to be nationals of blocked countries. • • • The property of such blocked nationals may not be dealt in except pursuant to license" [i.e. a "blocked" American cannot draw on his bank account to buy groceries without permission];
>
> • • • •
>
> "Innumerable instances may be noted where United States citizens were blocked or ordered removed from places of control in various enterprises;"
>
> • • • •
>
> "a number of law offices have been blocked and subjected to supervision".[16]

Assuredly the absence of a remedy to review such acts presents a question of large public importance, particularly since the "freezing" control continues in effect with respect to a large body of foreign property and claims of Americans with respect to such property are remediless. Respondent recently established that there can be no judicial review of a "freezing" order, i.e., no judicial compulsion to "unblock" assets, because the United States has not consented to suit and because "unblocking" requires "official" action so that an "individual" suit will not lie. *Codray* v. *Brownell*, 207 F. (2d) 610.[17]

---

[16] *Administration of the Wartime Financial and Property Controls of the United States Govt.*, U.S. Treas. Rept. Foreign Funds Control (Dec. 1942) pp. 28, 33.

[17] Earlier attempts to obtain judicial relief from "blocking" of American bank accounts ran into a thicket of technical objections. See, e.g., *Hartman* v. *Federal Reserve Bank*, 55 F. Supp. 801.

§9(a) of the Act (50 U.S.C. App. §9(a)) is available only with respect to property *"held by* [the Alien Property Custodian] or by the Treasurer *of* the United States". Patents licensed to others will not be so "held".[21] Remains the remedy against respondent's Directive to transfer certain patents to respondent. Respondent maintained in the court below that petitioner could not sue to recover those patents because it "is an enemy" (Brief, 27). Hence there was no means of reviewing any aspect of respondent's Directive and the "supervisory" power is therefore void for lack of judicial remedy.

A word as to our "standing" to defend, first questioned by respondent in the court below. He urged that *had* he vested the patents, Schering *would have had* no right to recover because it "is an enemy" and hence it cannot complain of those acts now (Brief, 28). Stripped of corporate terminology, this dream of what might have been amounts to this: American purchasers from respondent are powerless to complain of his wrongful acts in contemplation of the sale, although they were designed to bind them down the years. But the law is not so poor. This is not a suit by Schering to recover patents; it is a suit by respondent for specific performance. Section 7(b) of the Act expressly authorizes an enemy to defend; see *The Pietro Campanella*, 47 F. Supp. 374, 379-380. In defending, he is entitled to the "equal protection" of our laws. *Ex Parte Kumezo Kawato*, 317 U.S. 69, 71-72. It follows that in defending against specific performance, an enemy may set up the lawlessness of official acts.

Another notion which needs to be exploded is that "disclosure" of the agreement in the prospectus of sale

---

[21] Note also that §9 "deals with vested assets and not with those that are merely blocked." *Codray* v. *Brownell*, 207 F. (2d) 610, 614.

deprives the shareholders of a grievance. It is well-known that

> "the whole system of underwriting new security issues involving the use of the prospectus to safeguard, supposedly, the interests of the investor has broken down completely." [22]

The ordinary investor seldom, if ever, gets a prospectus, and could not understand it if he did.[23] Respondent would transform the SEC "disclosure" requirements, enacted as a shield for the protection of investors, into a trap for their destruction. A stockholder cannot be estopped by "disclosure" from complaining of corporate or official lawlessness. Cf. *Kahn* v. *Schiff*, 105 F. Supp. 973, 976.

## CONCLUSION

In these trying days, it is lamentable that the chief law officer of the United States should cut legal corners, that he should prefer to constrain directors in violation of state law rather than to employ lawful and practical alternatives, taking refuge in federal powers which he never before exercised and which were therefore presumably withheld, as can be confirmed from the face of the statute. Needless to say, respondent's unlawful "taking" by Directive can no more be excused because he might lawfully have *vested* the patents than an unlawful search and seizure will be excused because it might have been made under search warrant. Mr. Justice Brandeis has stated that the government itself must "observe the

---

[22] Quoted in Byse and Bradley, *Proposals To Amend the Registration and Prospectus Requirements of the Securities Act of 1933*, 96 U. of Pa. L. Rev. 609, 617 (1948).

[23] Lobell, *Revision of the Securities Act*, 48 Col. L. Rev. 313, 322 (1948); Douglas, *Protecting the Investor*, 23 Yale Rev. (N.S.) 521 (1934).

law scrupulously" lest the very "existence of the government • • • be imperiled." *Olmstead* v. *United States*, 277 U.S. 438, 495 (dissenting opinion). That, we submit, is the transcendent issue in this case.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN MILTON
RAOUL BERGER
*Attorneys for Petitioner*

*Of Counsel*

MILTON, MCNULTY & AUGELLI
DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY
IRVING H. JUROW

April 1956.

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,725

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

*v.*

SCHERING CORPORATION,
*Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued December 22, 1955

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

### OPINION OF THE COURT

(Filed January 17, 1956)

PER CURIAM

This case presents questions under the Trading With the Enemy Act. The Attorney General, as successor to the Alien Property Custodian, brought an action to enjoin alleged violation of an agreement entered into between his predecessor and the defendant in January, 1952, and for a declaratory judgment that the agreement was valid. The defendant by way of counterclaim asked for recision. In the district court the plaintiff was given what he asked for and the counterclaim was dismissed. 129 F. Supp. 879 (D. N.J. 1955). No questions of fact are involved.

Judge Hartshorne examined all the questions involved

in a commendably thorough opinion which covers fifty printed pages. He upheld the action of the government officials both as to its propriety under the corporation law of New Jersey and as authorized by federal statutes dealing with trading with the enemy. We do not disagree with his discussion of the rights of the sole shareholder of a corporation under the corporation law of New Jersey. But we do not find it necessary to adopt it here because we think the problems are those of the federal government's power and the extent of its exercise with regard to the statutes involved and steps taken in pursuance thereof. The district court opinion has met each point raised. We agree with the conclusions and do not think we can strengthen them by repeating in different words the views so clearly expressed.

The judgment of the district court will be affirmed.

A true Copy:
Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

## APPENDIX B

In summarizing the debates on the First War Powers Act, 1941, which amended section 5(b) of the Trading With the Enemy Act, Congressman Williams assured the House, with respect both to the prior Joint Resolution regarding "freezing" control and the 1941 amendment, that

> "there was no intention and there is no intention at all now that it should be applied to *any* transaction or any other property in which an American has an interest." 87 Cong. Rec. 9865 (1941). (emphasis supplied through out.)

Further extracts from the debates follow:

Mr. Sumners:
"• • • This is simply a section dealing with alien

enemies."

Mr. Kean:

"If it deals *only* with alien enemies I think it is perfectly all right."

Mr. Sumners:

"I believe there is no doubt about that." 87 Cong. Rec. 9859 (77th Cong., 1st Sess. Dec. 1941)

• • • •

Mr. O'Hara stated that the language

"might cause *confusion* about whether or not *it means both foreigners* and *citizens* of this country."

Mr. Hancock replied:

"I believe the gentleman will find the *limitation quite clear.* • • • *It deals with alien property.*"

Mr. O'Hara insisted, however,

"There is no question about the intention of the committee that this is to *deal only with foreign* property. That is the point to which I call the gentleman's attention."

To which Mr. Gwynne replied:

"Does not the gentleman think that the *entire bill covers nothing but aliens and alien property? There is no question about that, is there?*

Mr. Hancock commented:

"It is perfectly clear that it is intended by section 301 to *deal only with property* • • • *belonging to aliens.*" Id. at 9861.

Mr. Gwynne commented:

"• • • *It is my understanding,* as suggested by the Chairman of the Committee, [Sumners] that our *Committee had no thought other than to regulate alien property* • • •." Id. at 9862.

Mr. Springer stated:

"As I understand, the gentleman [Mr. Gwynne], has stated that subsection (b) of Section 301 *applies only to nationals of a foreign country* who have an interest in property in this country."

Mr. Gwynne:

"Yes; I think *that is clear.*" Id. at 9863.

Representatives Gwynne of Iowa and Hancock of New York were members of the Subcommittee that considered the bill. Id. at 9856.

## APPENDIX C

(Copy)

FORM APC-34
TURN-OVER DIRECTIVE

Approved January, 1944

8½" x 14"—Single Sheet, printed on both sides
(Reduced Facsimile)

FORM APC-34

Revised January, 1944

OFFICE OF ALIEN PROPERTY CUSTODIAN
Washington

TURN-OVER DIRECTIVE

Re: Property of .....
(Name of foreign national)

Vesting Order No. (Fed. Reg. 19 )

To: .....
(Name of Person in Possession of Property)

.....
(Address)

The undersigned, under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, and having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order and Act, or otherwise, executed and issued Vesting Order No. ..... dated .....
(a copy of which is annexed hereto and made a part hereof), and thereby vested the following described property of ....., a national of a
(Name of foreign national)
designated enemy country ( ):

Under the authority above set forth, the undersigned does hereby find and determine that the following described property, (hereinafter referred to as the said property), to wit:

now in your possession or under your control is property that was vested in the undersigned by the said vesting order.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Your attention is invited to Section 5(b) of the Trading with the Enemy Act, as amended, which provides that

> "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

The undersigned does hereby require that the said property, together with all dividends, accumulations and increment thereon, shall forthwith be by you turned over to the undersigned to be held, administered and accounted for as provided by law.

Executed at Washington, D. C. on ....., 19.....

.....

LEO T. CROWLEY
*Alien Property Custodian*

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statute and Orders Involved | 2 |
| Statement | 3 |
| Argument | 13 |
| 1. The Directive was a valid exercise of the authority under Section 5 (b) of the Trading With the Enemy Act to "direct and compel" a transfer of foreign (and enemy) property and to regulate the holding and use of such property | 14 |
| 2. There is no lack of remedy for a proper party to challenge illegal or unconstitutional exercise of the authority to "direct and compel" | 21 |
| 3. As a matter of equity, the courts below properly enforced the Agreement | 23 |
| Conclusion | 26 |


## CITATIONS

Cases:


| | |
|---|---|
| *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440 | 19 |
| *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216 | 19 |
| *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 | 18 |
| *American Exchange National Bank* v. *Garvan*, 273 Fed. 43 (C. A. 2), affirmed, 260 U. S. 706 | |
| *Becker Co.* v. *Cummings*, 296 U. S. 74 | 21 |
| *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183 | 19 |
| *Brownell* v. *Singer*, 347 U. S. 403 | 20 |
| *Buffum* v. *Barcelonx Co.*, 289 U. S. 227 | 25 |
| *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 | 14, 22 |
| *Codray* v. *Brownell*, 207 F. 2d 610, certiorari denied, 347 U. S. 903 | 23 |
| *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U. S. 581 | 19 |

Cases—Continued


| | Page |
|---|---|
| *Cordero* v. *Brownell*, 111 F. Supp. 556 affirmed, 211 F. 2d 90 | 22 |
| *Cummings* v. *Deutsche Bank*, 300 U. S. 115 | 18 |
| *In re Daly's Estate*, 189 Misc., 680, 74 N. Y. S. 2d 711 | 20 |
| *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194 | 20 |
| *Erickson-Hellekson-Vye Co.* v. *A. Wells Co.*, 217 Minn. 361, 15 N. W. 2d 162 | 25 |
| *Fahey* v. *Mallonee*, 332 U. S. 245 | 25 |
| *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848 (C. A. 2), certiorari denied, 269 U. S. 583 | 22 |
| *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492 | 25 |
| *Federation of Labor* v. *McAdory*, 325 U. S. 450 | 19 |
| *In re H. Hicks & Son*, 82 F. 2d 277 (C. A. 2) | 25 |
| *Isenberg* v. *Sherman*, 212 Cal. 454, 293 Pac. 1004, certiorari denied, 286 U. S. 547 | 19 |
| *Keppelmann* v. *Palmer*, 91 N. J. Eq. 67, 108 Atl. 432, certiorari denied, 252 U. S. 581 | 22 |
| *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 | 23 |
| *Lee* v. *State of New Jersey*, 207 U. S. 67 | 19 |
| *Mahler* v. *Eby*, 264 U. S. 32 | 17 |
| *Application of Mazzone*, 281 N. Y. 139, 22 N. E. 2d 315 | 25 |
| *Miller* v. *United States*, 11 Wall. 268 | 18 |
| *Murtland Holding Co.* v. *Egg Harbor Commercial Bank*, 123 N. J. Eq. 117, 196 Atl. 230 | 25 |
| *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 | 17 |
| *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 | 18 |
| *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 | 23 |
| *Renault* v. *L. N. Renault & Sons*, 188 F. 2d 317 (C. A. 3) | 25 |
| *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194 | 20 |
| *Silesian-American Corporation* v. *Clark*, 332 U. S. 469 | 18 |
| *Stoehr* v. *Wallace*, 255 U. S. 239 | 21 |
| *Swiss Ins. Co.* v. *Miller*, 267 U. S. 42 | 14 |
| *Ueberseé Finanz-Korp.* v. *McGrath*, 343 U. S. 205 | 14 |

Cases—Continued


| | Page |
|---|---|
| *United States* v. *Chemical Foundation*, 272 U. S. 1 | 16, 18 |
| *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N. Y. S. 2d 289 | 19, 20 |
| *In re Young's Estate*, 204 Misc. 92, 118 N. Y. S. 2d 803 | 20 |
| *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 | 23 |
| *Zittman* v. *McGrath*, 341 U. S. 446 | 20 |
| *Zittman* v. *McGrath*, 341 U. S. 471 | 20 |
| Statues and Executive Orders: | |
| Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. § 1, et seq.: | |
| Section 5 (b) | 2, 14, 15, 16, 21 |
| Section 9 (a) | 21 |
| Executive Order No. 8389, as amended | 2, 14, 16 |
| Executive Order No. 9193, as amended | 2, 15, 16 |
| Executive Order No. 9788 | 4 |
| Miscellaneous: | |
| Code of Federal Regulations (1952 revision), Title 8, Section 505.10 | 6 |
| General Order No. 31 (9 F. R. 7739) | 5 |
| 1 Morawetz, *Private Corporations* (2d. ed.) § 1 | 25 |
| Regulations of the Office of Alien Property Custodian, § 503.9 | 6 |
| Restatement, *Contracts* (1939): | |
| Section 90 | 25 |
| Section 492 | 23 |
| Special Order No. 31 | 10 |
| Vesting Order No. 139 (September 2, 1942) | 5 |
| Vesting Order No. 3328 (March 16, 1944) | 5 |
| Vesting Order No. 9704 (August 25, 1947) | 7 |
| Vesting Order No. 18685 (January 5, 1952) | 8, 20 |

# In the Supreme Court of the United States

OCTOBER TERM, 1955

---

No. 868

SCHERING CORPORATION, PETITIONER

*v.*

HERBERT BROWNELL, JR., ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

---

The opinion of the United States District Court for the District of New Jersey (R. 195–245) [1] is reported at 129 F. Supp. 879. The *per curiam* opinion of the United States Court of Appeals for the Third Circuit is reprinted in an appendix to the petition at pages 23–24. It is reported at 228 F. 2d 624.

[1] References designated as "R." are to the Joint Appendix in the court below, copies of which have been filed with this Court.

## JURISDICTION

The judgment of the Court of Appeals was entered January 17, 1956 (Pet. 2). The petition for certiorari was filed April 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Attorney General was authorized by the Trading with the Enemy Act to "direct and compel" the petitioner corporation, all the stock of which had been vested under the Act as German-owned, to transfer patents to him and to enter into an Agreement subjecting other patents to public licensing.

2. Whether the petitioner, which was an "enemy" for purposes of the Act at the time the Attorney General compelled it to execute the Agreement, has standing now to attack the statute under which the Attorney General acted or the procedural correctness of the action he took.

3. Whether the petitioner may now have the Agreement set aside after the Attorney General has sold his stock in reliance thereon.

## STATUTE AND ORDERS INVOLVED

The relevant provisions of Section 5 (b) of the Trading with the Enemy Act appear in the petition, pages 2–3. Executive Orders Nos. 8389 and 9193, both as amended, issued pursuant to the Act, are set forth in the record at pages 175–183 and 120–129, respectively.

STATEMENT

The Attorney General brought this action to enjoin violation of an Agreement entered into between his predecessor in office and the petitioner in January, 1952, and for a declaratory judgment that the Agreement was valid (R. 2–60). Under date of January 5, 1952, the then Attorney General, acting under the Trading with the Enemy Act and Executive Order No. 9193, as amended, had issued a Directive to the petitioner corporation and its directors, ordering the directors to authorize and the corporation to enter into the Agreement (R. 200–202a). They complied, and by the Agreement the petitioner assigned to the Attorney General certain patents and patent applications and agreed to license its other patents and applications on a reasonable royalty basis and to list them on the Register of Patents Available for Licensing and Sale (R. 5, 12–24, 35–36).

The abbreviated statement in the petition (pp. 3–4) gives only a bare outline of the facts on which this case depends. To place the action taken by the Attorney General and by the petitioner in perspective, we submit the following somewhat extended recital of the pertinent facts:

The petitioner is a New Jersey corporation, organized in December, 1935, to acquire the assets and business of a New York corporation of the same name, which was a wholly owned subsidiary

of Schering, A. G., a German corporation (R. 28). All its stock, except 3,150 shares of preferred, was owned by German stockholders (R. 78).

On April 18, 1942, the Alien Property Custodian vested all but six shares of the petitioner's common stock and 2,225 shares, or 42 per cent, of the preferred (R. 131–133).[2] Two days later the Custodian announced that his representatives were supervising the operations of the company (R. 113).[3] According to a stipulation of the parties, after the vesting the petitioner "conducted its business pursuant to documents issued from time to time by the Alien Property Custodian or the Attorney General as his successor" (R. 78),[4] and "such documents reflect actual supervision and control of and over Schering Corporation by the Custodian and his successor, as those terms are employed in common usage" (R. 81). A typical "Authorization", dated December 23, 1947, authorized transactions "necessary to the normal conduct of the business", but stated that specific authorization would be necessary for a number of matters, and required the submission

[2] Only the common stock had voting rights (R. 48).

[3] The Attorney General succeeded to the functions and authority of the Alien Property Custodian on October 15, 1946 (Executive Order No. 9788, 11 F. R. 11981).

[4] Before the vesting and shortly after Pearl Harbor, the Treasury Department had placed supervisory representatives and guards in petitioner's plant (R. 112, 114), and on January 29, 1942, that Department announced that it had suspended the then President of Schering and seven other officials and barred them from the premises (R. 110).

of reports, copies of minutes of stockholders and directors' meetings, and, with ten days' advance notice, of notice of directors' meetings and the agenda therefor (R. 88–93).

On July 10, 1944, the Custodian issued General Order No. 31 (R. 172–174, 9 F. R. 7739) by which he prohibted all transactions by any business enterprise in which he had vested interests, except as authorized by him or his agent or delegate or by a supervisor designated by him. Some two years later—on findings that he had vested all 44,000 shares of the common stock[5] and 2,225 shares of the preferred and had assumed supervision, jurisdiction, and control of the corporation pursuant to the vesting orders and by virtue of General Order No. 31, that the petitioner was engaged in the manufacture of "drugs and biologicals of vital importance to public health and the medical branches of the armed forces", and was an important corporation in a field closely related to the defense economy—the Cus-

[5] On September 2, 1942 (Vesting Order No. 139, R. 142–144), the Custodian had vested one additional share of common and on March 16, 1944 (Vesting Order No. 3328, R. 139–141), he vested the last five outstanding shares of common. These vesting orders determined that the corporation was a national of a designated enemy country (Germany) and contained findings that "to the extent that any or all of such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of such designated enemy country".

384798—56——2

todian designated Schering as a "key corporation" within the meaning of § 503.9 of the Regulations of the Office of Alien Property Custodian (R. 86–87),[6] which restricts the ownership of stock of "key corporations" to "American nationals" as defined therein. See R. 48–52. This was followed in 1949 by Special Order No. 28 by which the Attorney General, as successor to the Custodian, directed the corporation to amend its Certificate of Incorporation to provide that only American nationals could hold its stock. The corporation complied (R. 49).

In April 1949, the Attorney General, by directive, ordered the petitioner to license the patents it held as of December 31, 1948, to all qualified applicants.[7] The directive referred to the vesting orders covering the stock and determined that "in the administration of the property so vested and transferred * * * it is in the interest of and for the benefit of the United States" that the patents be licensed (R. 98–102). The petitioner obeyed the directive and granted a number of licenses in 1949, 1950, and 1951 (R. 34).

Either in late 1947 or early 1948 the Attorney General advised the corporation that he was

[6] § 503.9 is now § 505.10 of Title 8 of the Code of Federal Regulations (1952 revision).

[7] Including patents issued thereafter on applications filed before that date. Royalties were to be agreed upon by the parties, and in default of agreement would be determined by the Office of Alien Property.

planning to sell the vested stock (R. 102–103, 67).[8] As a preliminary to the sale of the vested stock, the Attorney General, on January 5, 1952, issued the Directive which led to the Agreement which is the subject of this action (R. 45, 66–68). It was addressed to the corporation and to its "Board of Directors, collectively and individually" (R. 200) and, after reciting the vesting orders and the Attorney General's ownership of the outstanding stock,[9] it stated that Schering Corporation was subject to the supervision, jurisdiction and control of the Attorney General under the Trading with the Enemy Act and that:

> In the exercise of the authority and functions vested in or delegated to the Attorney General under the Trading with the Enemy Act, as amended, and in the administration of the property and interests vested in him as aforesaid, the Attorney General, after investigation, has determined it to be in the interest of and for the benefit of the

[8] The preferred stock was retired in 1949. At the same time the common stock held by the Attorney General was split ten for one, giving 440,000 shares (R. 30).

[9] In addition to the vesting of the stock, the Custodian had on July 30, 1942, vested one patent application standing in petitioner's name (R. 14), and on January 15, 1952, the Attorney General vested any rights and interests of Schering, A. G., in the goodwill of petitioner's business and in its trademarks and trade names. Those rights he assigned to the petitioner for the sum of $10 (R. 34). Also, on August 25, 1947, the Attorney General had vested (Vesting Order No. 9704, 12 F. R. 6224) all interest and right created in Schering, A. G., by five agreements with the petitioner.

United States that (1) the patents and patent application in said Exhibit A [10] be transferred to, or retained by, the Attorney General to be administered in accordance with policies or procedures generally applicable to other patents held by him pursuant to the Trading with the Enemy Act, and (2) the patents listed in Schedule 1 of said Exhibit B and any patents hereafter issued on the patent applications listed in Schedule 2 of said Exhibit B [11] be made available by Schering for licensing to qualified applicants on a non-discriminatory, non-exclusive, reasonable-royalty basis. * * * The aforesaid determination may appropriately be accomplished by the execution and performance of an Agreement, substantially in the form of the attached Agreement by Schering Corporation and the Attorney General.

Pursuant to the Directive, the Board of Directors adopted a resolution authorizing the execution of the Agreement (R. 77), and it was sub-

[10] Exhibit A covered the patents and applications originating prior to April 18, 1942, the date of the first vesting order relating to Schering stock. This was called the period of "German control" (R. 35), and those patents and applications were termed the "old" patents. By Vesting Order No. 18685, also dated January 5, 1952 (R. 136–139), the Attorney General vested "all right, title and interest and claim" of Schering, A. G., in the "old" patents. As part of the Agreement entered into pursuant to the Directive, the Attorney General granted the petitioner an irrevocable, non-exclusive, royalty free license under these patents (R. 59).

[11] Exhibit B covered the patents and applications issued or filed on or after April 18, 1942, and before January 1, 1952—termed the "new" patents (R. 35–36).

sequently executed on January 17 and 18, 1952, effective as of January 1, 1952 (R. 4). Petitioner's President executed the Agreement on its behalf as the "free and voluntary act and deed of said corporation by virtue of authority from its Board of Directors" (R. 23), and the Director of the Office of Alien Property executed it on behalf of the Attorney General (R. 24).

By the Agreement, the petitioner transferred to the Attorney General the patents and applications originating during the period of "German control" (fn. 10, *supra,* p. 8) (R. 17). All royalties accruing after the effective date of the Agreement under previously issued licenses on these patents were also transferred to the Attorney General (R. 17). As to the remainder of its patents and patent applications (up to January 1, 1952), the corporation entered into an "irrevocable commitment" (R. 35–36, also R. 19, 20) to issue non-exclusive licenses to qualified applicants for reasonable royalties and to list them within 75 days on the Register of Patents Available for Licensing and Sale in the Patent Office. It was agreed that any patents issued on applications retained by Schering would be so listed within 30 days after issuance (R. 21). On the patents transferred to him the Attorney General granted the petitioner a non-exclusive, irrevocable, non-assignable, royalty-free license (R. 19). The Agreement was effective as of January 1, 1952, and was to continue until all patents and appli-

cations retained by the corporation had expired or been abandoned and denied (R. 22).

Immediately after the execution of the Agreement the Attorney General proceeded with the sale of the Schering stock. On January 18, 1952, by Special Order No. 31 he authorized and directed the petitioner, its officers and directors, to take all steps necessary and appropriate for the filing with the Securities and Exchange Commission of a registration statement and of a prospectus to be issued on behalf of the Attorney General (R. 73–76). The statement and prospectus were duly filed. The officers and directors of the corporation certified that (R. 105):

> * * * all statements contained in said Registration Statement are true and no material fact known to them which is required to be stated therein or which is necessary to make the statements therein not misleading, has been omitted.

Notice was given of the obligations imposed on the corporation by the Agreement with the Attorney General and its possible effect upon the business, in this language (R. 34–36):

> On January 5, 1952, the Attorney General issued a directive under the Trading with the Enemy Act, as amended, determining it to be in the interest of and for the benefit of the United States (1) that all of the Corporation's patents and patent applications originating during the period of German control of the Corporation, that

is prior to April 18, 1942, be transferred to or retained by the Attorney General to be administered in accordance with policies or procedures generally applicable to other patents held by him pursuant to the Trading with the Enemy Act, under which royalty-free revocable licenses are presently issued to any qualified applicant, and (2) that all other patents heretofore or hereafter issued on patent applications filed on or after April 18, 1942 and before January 1, 1952 be made available by the Corporation for licensing to any qualified applicants on a non-discriminatory, non-exclusive, reasonable royalty basis, and requiring the Corporation to enter into an agreement to carry out the purposes of the policy above set forth. The agreement hereinafter referred to has been executed by the Corporation, effective as of January 1, 1952, in compliance with such directive.

By the terms of said agreement the Corporation has transferred and assigned to the Attorney General all United States Patents owned by it which were issued upon appliications filed prior to April 18, 1942. * * *

The Corporation's remaining patents, that is, those issued upon applications filed on or after April 18, 1942 and before January 1, 1952, are made subject to an irrevocable commitment on the part of the Corporation to license them on a reasonable royalty basis to any qualified applicant * * *.

In the prospectus no value was placed on the corporation's patent rights (R. 56–57). The prospectus stated that the corporation's management believed that the Agreement "* * * will have an adverse effect upon its future sales and profits which may very well be material" (R. 36).

On March 13, 1952, the Attorney General sold his stock in petitioner to a group of investment bankers who re-sold the stock to the public (R. 3, 80).

After the sale, petitioner refused to perform its obligations under the Agreement (R. 80). In this action brought by the respondent to enforce the Agreement, the petitioner alleged that it entered into the Agreement under duress, that the Act did not authorize the Attorney General to require the execution of the Agreement, that it was not the act of the petitioner, and lacked consideration. By way of counterclaim the petitioner asked for rescission (R. 60–73).

The parties stipulated that the petitioner denied the validity of the Agreement and had not licensed its patents or listed them for licensing (R. 82–83). It was also stipulated that the Government exercised compulsion, including fear of imprisonment, on the petitioner's directors and officers to have them authorize and execute the Agreement; that the officers and directors understood the instruments they executed and the acts

called for by such instruments; but that they did not execute or authorize the instruments of their own free will and in the exercise of their discretion (R. 77).

On motion to dismiss the counterclaim, the District Court held the Agreement lawful and binding (R. 195–245) and dismissed the counterclaim (R. 246). By a pretrial order the parties agreed to submit the case for decision on the pleadings and the stipulations (R. 83–84). On July 8, 1955, the District Court entered a final order declaring the Agreement valid and enforceable and enjoining violations thereof (R. 246–248).

On appeal, the Court of Appeals, *per curiam*, affirmed on January 17, 1956, the opinion of the District Court. 228 F. 2d 624; Pet. App., 23–24.

## ARGUMENT

The Directive by which the Attorney General compelled the execution by petitioner of the Agreement was within the powers of the Attorney General under the Trading with the Enemy Act and was a proper exercise of those powers "in the interest of and for the benefit of the United States" (R. 201). It follows that the Agreement was valid and binding upon petitioner; moreover, petitioner has no standing to attack the Agreement.

1. THE DIRECTIVE WAS A VALID EXERCISE OF THE AUTHORITY UNDER SECTION 5 (B) OF THE TRADING WITH THE ENEMY ACT TO "DIRECT AND COMPEL" A TRANSFER OF FOREIGN (AND ENEMY) PROPERTY AND TO REGULATE THE HOLDING AND USE OF SUCH PROPERTY.

As of January 1952, when the Attorney General issued the Directive and the Agreement was executed, the petitioner was an "enemy" within Section 2 of the Act, as amended in 1941 by the First War Powers Act, because until April 18, 1942, all of petitioner's stock, except for 3,150 shares of preferred, was German-owned. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480; *Uebersee Finanz-Korp.* v. *McGrath*, 343 U. S. 205. For the same reason petitioner was also a "foreign national" within Section 5 (b) of the Act and Executive Order No. 8389, as amended (R. 175–183). The petitioner continued to be an "enemy" for purposes of the Act and its assets continued to be enemy property after the vesting of the shares. *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42. In 1949, the preferred stock was retired (R. 30), so that in January 1952, all the outstanding stock was the "enemy" shares held by the Attorney General, and, except for the interest of the United States, there was no non-enemy interest in the corporation or its assets.[12] What the Directive

[12] Petitioner could also still be treated as a "national" of Germany because "on or since" June 14, 1941, a substantial part of its stock was German-owned. Executive Order No. 8389, as amended (R. 175–183, at 180).

dealt with was wholly enemy (and foreign) property.

a. Section 5 (b) authorized the President or his delegate to "* * * regulate, direct and compel * * *" any use of or rights in "any property in which any foreign country or a national thereof has any interest" (Pet. 2–3). By Executive Order No. 9193, issued under Section 5 (b), the President delegated to the Alien Property Custodian (whose successor is the Attorney General) authority to "take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest" patents in which a foreign "national" had any interest (R. 120–129).

The Directive was clearly within the statutory authority to "regulate, direct and compel", and the Executive Order plainly comprehended the power to direct a transfer to the Attorney General of petitioner's "old" patents and to compel it to hold its "new" patents on the condition of licensing them to all qualified applicants on a reasonable royalty basis.[13] Petitioner was a foreign "national" for purposes of the Executive Order because of the German ownership of its stock on June 14, 1941. To render a corporation a foreign national no administrative finding

[13] The last also came within the authority under Section 5 (b) to "regulate" the exercise of "any right, power or privilege".

is necessary; the fact of foreign stock ownership is enough. Executive Order No. 8389, as amended, Section 5E (ii) (R. 180). And under Executive Order No. 9193, Section 2 (d) (R. 122), the Attorney General could "regulate, direct and compel" the transfer and use of the patents of a foreign national without making any findings under Section 10 (a) (R. 126–127) of that Order as to whether the corporation was also a "national of a designated enemy country".

In addition, the direction of the assignment and licensing of the patents was proper as a step in the administration of the vested shares of stock and a *pro tanto* liquidation of the values which those shares represented. The Attorney General was the sole stockholder, and under Section 5 (b) (Pet. 2–3) his duty was to administer, liquidate, and deal with the vested property "in the interest of and for the benefit of the United States".[14]

[14] Petitioner argues (pp. 10–11) that the Act did not authorize the Custodian to compel enemies to make gifts of their property to private individuals. But in *United States* v. *Chemical Foundation*, 272 U. S. 1, this Court sustained the validity of similar action by the World War I Custodian with respect to enemy patents. And, in the District Court, petitioner admitted that the purpose of the Directive and the Agreement was "in accord with the settled policy of the Government for the benefit of this country and its citizens, and thus to be valid" (R. 198); also, "Schering admits that it was in the interest and for the benefit of the United States to have Schering's patents used for the benefit of this Government and of its qualified citizenry generally" (R. 213).

b. As against this, petitioner urges (Pet. 12) that the Act does not authorize the Alien Property Custodian to take property by what it terms the "supervisory power", and that he may do so only by a vesting order because the power to "direct and compel" the transfer of property in which a foreign national has "any interest" might also affect American interests in the property. But, even assuming that the Attorney General, as successor to the Custodian, could not properly "direct and compel" a transfer of property in which the foreign interest was only partial, it does not follow at all that he could not do so in a case where the property in question was not only entirely foreign-owned, but was also enemy-owned; nor does it follow, in any event, that the *enemy* could challenge the Attorney General's action even if it were unauthorized.

This fact that, as of January, 1952, petitioner was an enemy within the Act vitiates its whole attack on the Directive. In the cases on which petitioner relies to support its asserted requirement of "jurisdictional findings", like *Mahler* v. *Eby*, 264 U. S. 32, and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the party aggrieved by the administrative order was not an enemy and was within the full protection of the due process and just compensation clauses of the Fifth Amendment, as well as the statutory provisions made for his protection. Petitioner, however, was an enemy within the Act, and this Court has repeatedly

held that with the property of an enemy the United States may deal as it sees fit; it may seize the property, appropriate it, or confiscate it. *United States* v. *Chemical Foundation,* 272 U. S. 1, 11; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 120–121; *Silesian-American Corporation* v. *Clark,* 332 U. S. 469, 475; *Miller* v. *United States,* 11 Wall. 268, 305–306.

Whatever limitations Congress or the President may have placed on the Attorney General's dealing with enemy property were therefore not for the enemy's benefit but for the benefit of the general American public or of individual citizens. Accordingly, the *enemy* has no standing to complain if the Custodian has failed to abide by the statutory limitations. It follows that in January, 1952, petitioner did *not* have, as against the Attorney General, that "legally protected" interest which is the necessary basis for an attack in the courts on the validity or propriety of administrative action. See, *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125. And if the Directive invaded no "rights" which petitioner had, as of January, 1952, against the Attorney General, it may not now retroactively make the Directive into a "wrong".

Likewise, having been an enemy in January 1952, petitioner may not now invoke the rights of non-enemies, a class to which it did not belong when the Attorney General issued the Directive.

*Lee* v. *State of New Jersey,* 207 U. S. 67, 70; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 190. Similarly, it may not attack the Directive on the basis that the application of the "supervisory power" to property interests of American, or of "freezing" controls, might be unconstitutional. No such question arises here, and the Court will not invalidate the Act because on other facts its application might have been unconstitutional. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479.

c. Even passing the point of standing, petitioner's attack on the procedure followed by the Attorney General is without merit. Nothing in the Act requires that the Attorney General use one particular set of words or one particular form of order when dealing with property which is admittedly "enemy". *Isenberg* v. *Sherman,* 212 Cal. 454, 298 Pac. 1004, 1023, certiorari denied, 286 U. S. 547; *In re Yokohama Specie Bank,* 188 Misc. 137, 66 N. Y. S. 2d 289, 293. The District Court correctly held (R. 229–240) that, if findings were necessary, the Directive did contain those findings and that reference could be made to the findings in the vesting orders mentioned in the Directive. See *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 581, 595; *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 228; *Securities and Exchange Commission* v.

*Chenery Corp.*, 332 U. S. 194, 196; *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 211.

Petitioner is also in error in asserting (Pet. 14) that *all* transfers of title and possession to the Custodian have been affected by vesting orders. In a sizable number of cases the transfer has been accomplished by a "turn-over directive", which has the effect of a "*res* vesting". *Zittman* v. *McGrath*, 341 U. S. 446, 464. See, for example, *Zittman* v. *McGrath*, 341 U. S. 471; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N. Y. S. 2d 289; *In re Daly's Estate*, 189 Misc. 680, 74 N. Y. S. 2d 711; *In re Young's Estate*, 204 Misc. 92, 118 N. Y. S. 2d 803. The compelling of a transfer to the Custodian by means of such a directive has been approved by this Court. *Zittman* v. *McGrath*, 341 U. S. 471; *Brownell* v. *Singer*, 347 U. S. 403.

The same procedure was followed in the instant case. By Vesting Order No. 18685 (R. 136–139) the Attorney General vested "All right, title and interest and claim" of the petitioner's parent corporation, Schering, A. G., of Germany, in, to, and under the "old" patents (R. 136–139). Then, contrary to the statement in the petition (Pet. 15, n. 14), in a directive specifically referring to Vesting Order No. 18685 (R. 200a), the Attorney General ordered the petitioner to execute the Agreement which assigned to him the "old" patents (R. 201, 17).

2. THERE IS NO LACK OF REMEDY FOR A PROPER PARTY TO CHALLENGE ILLEGAL OR UNCONSTITUTIONAL EXERCISE OF THE AUTHORITY TO "DIRECT AND COMPEL".

Although the petitioner states (Pet. 11) that it "reserves" the question whether under New Jersey law the Attorney General as the sole stockholder could constrain the authorization of the Agreement by the Corporation's directors,[15] it does argue at length (Pet. 16–21) that the "supervisory clause"—that is, the part of Section 5 (b) which empowers the Attorney General to "direct and compel"—is unconstitutional because it provides no remedy. According to petitioner (Pet. 18), the directors of petitioner had a "fundamental right to act in accordance with their conscience and judgment," and the Directive was an infringement of that right.

As to the constrained transfer of the "old" patents, it is clear that there was a sufficient constitutional remedy under Section 9 (a) of the Act, and that if the directors had desired to attack that feature of the Directive and the Agreement and to question whether the corporation was in fact an enemy, they could have brought suit under that Section. *Stoehr* v. *Wallace,* 255 U. S. 239; *Becker Co.* v. *Cummings,* 296

[15] The District Court held that the sole stockholder could constrain the action of the directors under New Jersey law (R. 205–210), and the Court of Appeals did not disagree, although it did not find it necessary to adopt that holding (Pet. App. 24).

U. S. 74; *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480. Section 9 (a) applies to all property "transferred" to the Custodian and "held" by him.

As to the direction to enter into the Agreement to license the "new" patents, the rights of the directors, as representatives and fiduciaries, could, of course, rise no higher than those of the corporation. See, *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 853 (C. A. 2), certiorari denied, 269 U. S. 583; *Cordero* v. *Brownell*, 111 F. Supp. 556, 558 (S. D. N. Y.), affirmed, 211 F. 2d 90 (C. A. 2); *Keppelmann* v. *Palmer*, 91 N. J. Eq. 67, 108 Atl. 432, certiorari denied, 252 U. S. 581. Since the corporation (as an enemy) had to obey, and since Congress can validly withhold remedies from an enemy (*supra*, pp. 17–18), the directors could not decline, on grounds of "conscience and judgment", to comply with the Directive; nor need judicial remedies be available to them. Obviously, to "direct and compel" corporate action by an enemy corporation the Attorney General must have the authority to override the discretion of directors.

Petitioner conjures up the specter of the unlimited and unreviewable "freezing" or "blocking" of American or non-enemy property (Pet. 17). As we have pointed out, there is no such question in this case, but in any event it seems clear that if the directors wanted to question the order to license the "new" patents, either on the

ground that petitioner was not an enemy, or even that the Directive infringed a "fundamental" right of theirs, they had open to them the classic remedy of a suit for an injunction, which would restrain action by the Attorney General in excess of his statutory authority or under an unconstitutional statute. See, *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619, 621; *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682, and cases cited; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579.[16]

3. AS A MATTER OF EQUITY, THE COURTS BELOW PROPERLY ENFORCED THE AGREEMENT.

Interwoven with petitioner's arguments on statutory construction and constitutionality is a suggestion that in some way the result of enforcing the Agreement "procured under duress." (Pet. 9)[17] will be to victimize the "American purchasers" of the vested stock from the Attorney General. See also the petition at pp. 20–21.

We have stated, *supra,* pp. 6–7, 10–12, in detail

[16] Petitioner cites *Codray* v. *Brownell,* 207 F. 2d 610 (C. A. D. C.), certiorari denied, 347 U. S. 903, for the proposition that an "individual" suit against an official to "unblock" assets will not lie (Pet. 17 n.). But in *Codray* the original "blocking" of assets was admittedly lawful; there was no question as to the authority of the Attorney General to "block" the assets under Section 5 (b).

[17] Except for this one use of the word, the petition does not argue duress. It is clear that, the action of the Attorney General being authorized by law, there was no duress. Restatement, *Contracts* (1939), § 492.

the facts as to the sale of the vested shares by the Attorney General. In brief, they are that the Agreement was an integral part of the Attorney General's over-all plan for returning the corporation to private ownership by selling the vested shares (R. 67–69, 102, 103). Accordingly, he caused the filing with the Securities and Exchange Commission of a prospectus (R. 24–60) which described the Agreement in detail and stated the opinion of the management that the effect upon the corporation's future sales and profits would be adverse (R. 36, 60). Then he sold the vested shares to a syndicate of investment bankers who thereafter sold to the public (R. 80).

Whatever the purchasers from the brokers knew about the stock they bought, there can be no claim that the brokers who bought from the Attorney General were not familiar with the prospectus and the statements therein about the Agreement.[18] What they bought from the Attorney General was stock in a corporation which had assigned some of its patents and agreed to license the others at reasonable royalties, and that was what they sold to the public.[19]

---

[18] The prospectus stated that the "old" patents had been assigned and that there was "an irrevocable commitment" to license the "new" patents (R. 35–36).

[19] The petition quotes (Pet. 9–10) from the Government's brief in the Court of Appeals a portion of a sentence speaking

Since the Agreement was a condition of the sale of the stock by the Attorney General, it will be enforced because "injustice can be avoided only by enforcement of the promise". Restatement, *Contracts*, § 90. And, there being no prejudice to the rights of third parties as of its date, the corporation is bound by the Agreement executed at the behest of its sole stockholder. *Renault* v. *L. N. Renault & Sons*, 188 F. 2d 317, 330 (C. A. 3); *Murtland Holding Co.* v. *Egg Harbor Commercial Bank*, 123 N. J. Eq. 117, 196 Atl. 230, 234. There is no injustice to the present stockholders of petitioner, for they bought their stock subject to the burden of the Agreement. See *Buffum* v. *Barceloux Co.*, 289 U. S. 227, 234; *Application of Mazzone*, 281 N. Y. 139, 22 N. E. 2d 315, 319. Their rights in the corporation cannot rise above those of the brokers from whom they purchased. *Erickson-Hellekson-Vye Co.* v. *A. Wells Co.*, 217 Minn. 361, 15 N. W. 2d 162, 172, citing 1 Morawetz, *Private Corporations (2d ed.)*, § 1. And cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 502; *Fahey* v. *Mallonee*, 332 U. S. 245, 255. Otherwise, they would receive a windfall in the form of patent rights they did not purchase.

---

of "the third parties into whose hands the stock passes." In context, the words "third parties" referred to the brokers who bought from the Attorney General. See *In re H. Hicks & Son*, 82 F. 2d 277, 279 (C. A. 2).

## CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*

DALLAS S. TOWNSEND,
*Assistant Attorney General.*

JAMES D. HILL,
GEORGE B. SEARLS,
*Attorneys.*

MAY, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

MAY 13 1956
HAROLD B. WILLEY, C

IN THE

# Supreme Court of the United States

October Term, 1955

---

No. 868

---

SCHERING CORPORATION, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian.

---

## REPLY BRIEF FOR PETITIONER

---

JOHN MILTON
RAOUL BERGER
*Attorneys for Petitioner*

*Of Counsel:*
MILTON, MCNULTY & AUGELLI
DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY
IRVING H. JUROW

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

## INDEX


PAGE

I The directive is void for lack of jurisdictional findings ..... 1

II Respondent was not empowered to direct an enemy national to license its patents to private individuals ..... 4

III Respondent was not authorized to take property by exercise of the supervisory power..... 5

IV The supervisory clause is unconstitutional because no remedy is furnished for review of a supervisory order ..... 10

V As a matter of equity, respondent is not entitled to relief ..... 12


*Citations*

*Cases*


Alabama Great S. R. Co. v. United States
340 U.S. 216..... 3

Bank of the United States v. Planters' Bank
9 Wheat. 904 ..... 10

Becker v. Miller
7 F. (2d) 293 ..... 12

Brownell v. Singer
347 U.S. 402 ..... 9

Clark v. Edmunds
73 F. Supp. 390 ..... 9

Colorado Interstate Gas Co. v. Federal Power Comm.
324 U.S. 581 ..... 3

Ex parte Kumezo Kawato
317 U.S. 69 ..... 6

Federal Sugar Ref'g. Co. v. United States Sugar Eq. Bd., 268 Fed. 575 ..... 10

Kahn v. Garvan
263 Fed. 909 ..... 9

PAGE

Kahn v. Schiff
105 F. Supp. 973 ..... 12
Mahler v. Eby
293 U.S. 388 ..... 1
McGrath v. Ward
91 F. Supp. 636 ..... 9
New York v. United States
342 U.S. 882 ..... 13
Panama Ref'g. Co. v. Ryan
293 U.S. 388 ..... 1
Re H. Hicks & Son
82 F. (2d) 277 ..... 6
Scarborough v. Atlantic Coast Line R. Co.
178 F. (2d) 253 ..... 12
Securities & Exch. Comm. v. Transamerica Corp.
67 F. Supp. 326 ..... 10
Sutherland v. Selling
16 F. (2d) 865 ..... 10
The Arrogante Barcelones
7 Wheat. 496 ..... 12
United States v. Chemical Foundation
272 U.S. 1 ..... 4
United States v. Ryan
284 U.S. 167 ..... 6
Zittman v. McGrath
341 U.S. 446 ..... 9
Zittman v. McGrath
341 U.S. 471 ..... 9

*Miscellaneous*

8 SEC Protective Comm. Study, 289 ..... 7

In The

# Supreme Court of the United States

October Term, 1955

No. 868

Schering Corporation, *Petitioner*

v.

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian.

## REPLY BRIEF FOR PETITIONER

A reply brief is made necessary by arguments which respondent now advances for the first time. We remind the Court that respondent sued for specific performance; and the defense is illegal compulsion which made the agreement void for duress.

### I

### The Directive Is Void for Lack of Jurisdictional Findings

1) Respondent urges that an "enemy" is not entitled to "jurisdictional findings" under the rule of *Mahler* v. *Eby*, 264 U.S. 32, because it is not entitled to due process and just compensation. Brief in Opposition (hereinafter Br. Opp.) p. 17. The requirement of findings does not, however, rest on due process but on the fact that there is an exercise of "delegated legislative power", *Mahler* v. *Eby*, 264 U.S. 32, 44, being aimed to preclude "unfettered discretion", *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 431. Not yet have "enemies" resident in these United States been handed over to the "unfettered discretion" of administrators. Cf. our Petition (hereinafter Pet.) 20. That way lies the road to charnel houses.

2) For the first time respondent now argues that Schering was a "foreign", as well as "enemy", national and that no findings were necessary with respect to a "foreign" national, citing Section 5E(ii) of Executive

Order 8389 (Br. Opp. 15-16). That section in pertinent part defines "national" to include a corporation which has been "controlled by", or the securities of which have been "owned or controlled by", a "foreign national" (App. 180a). Since jurisdiction is limited to such persons, findings responsive to the jurisdictional limitations are manifestly required. No such findings are contained in the Directive (App. 200a).[1]

True, sections 2(a) and 2(b) of Executive Order 9193 set up two categories of "business enterprises"—"enemy" and "foreign" national (App. 121a)—but, section 10 (App. 126a) lays down that

> "The term 'national' shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries * * * shall not be deemed to be a national of a designated enemy country unless the Alien Property Custodian determines" (italics in the original)

certain things. If the limitations so imposed by section 10 might be disregarded on the ground that an "enemy" national was also a "foreign" national, they would be nullified. That the section 10 limitations govern a "foreign" national which is also an "enemy" national was repeatedly recognized by respondent and his predecessors in dealing with Schering itself; for, as respondent himself states, the

> "vesting orders determined that the corporation was a national of a designated enemy country (Germany) and contained findings that 'to the extent that any or all of such nationals are not persons within a

---

[1] Note too that section 2(b) of "9193" authorizes the Custodian to deal with a "business enterprise" which is a "foreign" national only

> "when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest * * *"

to take described action (App. 121a). There is no such determination or certificate.

designated enemy country the national interest of the United States requires that such persons be treated as nationals of such designated enemy country'." (Br. Opp. 5, fn. 5).

It is the absence of precisely this finding which vitiates the Directive that issued under the quite different "supervisory" power.

3) For the first time, also, respondent now argues that he could have taken the patents of Schering as a "foreign" national under Par. 2(d) of "9193" without making the jurisdictional findings required by section 10(a) (Br. Opp. 16). But the findings required even in the case of a "foreign national" (supra, p. 2) were not made in the Directive. Moreover, the "property" of an enemy "business enterprise" is governed by section 10(a). That such "property" includes "patents" is confirmed in this case by respondent's own Vesting Order 18685 (App. 136a), where, seeking to cut off the remote possible "interest" of German Schering in petitioner's patents, he vests this interest as "property" of an "enemy" national and makes the very findings which are fatally lacking in the Directive (App. 138a).

4) Defendant urges that "reference could be made to the findings in the vesting orders mentioned in the Directive" (Br. Opp. 19). There was no incorporation by reference of the vesting order findings, merely a mention of the vesting orders themselves (Pet. 6). The cases cited by respondent are of no avail. *Colorado Interstate Gas Co.* v. *Federal Power Comm.*, 324 U.S. 581, was not a case of *absent* findings. Findings had been made; the question was whether they were adequate. The Court held that the findings were not too "vague and obscure". Id at 595. It is one thing to construe an "obscure" finding and, as is shown by *Mahler* v. *Eby* (Pet. 6), something else again to *supply* a missing finding.[2]

---

[2] Similarly, in *Alabama Great S.R. Co.* v. *United States*, 340 U.S. 216, the Court said that the Commission is not required "to

## II

### Respondent Was Not Empowered To Direct an Enemy National To License Its Patents to Private Individuals

To this argument (Pet. 10-11) respondent replies that in *"United States* v. *Chemical Foundation*, 272 U.S. 1, this Court sustained the validity of *similar action* by the World War I Custodian with respect to enemy patents." (Br. Opp. 16, fn. 14) (italics supplied throughout). There the patents had first been "seized", i.e. vested, by the Custodian and it was conceded that "they were lawfully taken over." 272 U.S. at 9. All that was in issue was the legality of the Custodian's sale *after* the seizure. Here respondent did not vest and make a public sale of the patents; he issued a Directive to petitioner under the "supervisory" power to license them to strangers.[3] That difference is central to our case.

---

make detailed findings of fact." But this "does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order." The latter findings had there been made. Id. at 227-228.

[3] The sordid possibilities of the power here claimed by respondent are underscored by the unsavory facts of the *Chemical Foundation* case. While Director of a branch of the Alien Property Custodian, Garvan and his associates conferred with American industry representatives to arrange to seize and sell the German patents. Later, Garvan, then Custodian, acted for the United States in making the transfers to the Chemical Foundation of which he was the President, and his associates became General Counsel and Patent Attorney for the Foundation. These facts led Attorney General Stone to bring suit to set aside the sale on ground of fraud. Those charges were not examined by this Court because the lower courts had concurred in finding that the United States failed to establish fraud and conspiracy, 272 U.S. at pp. 17, 14. Consider how such possibilities would be heightened if the Custodian could dispense with vesting and public sale and could merely direct an enemy to deliver his patents or other property to individual Americans, especially since no remedy whatsoever exists to challenge the latter action. (Pet. 18-20).

## III

### Respondent Was Not Authorized To Take Property by Exercise of the Supervisory Power

1) Respondent wraps himself in the literal terms of the statute (Br. Opp. 15) and makes no reply to our demonstration that a literal reading of "compel a transfer" nullifies the statutory limitation of vesting to enemy property, thwarts the intention of Congress to exempt Americans from a taking and runs counter to the unvarying administrative practice of taking enemy property by "vesting", not by "supervisory", order (Pet. 12-15). He assumes that he cannot "compel a transfer" of property in which American interests are intermixed but argues that it suffices that entirely enemy-owned property may be so taken (Br. Opp. 17). This begs the question, which is not one of constitutional power to "confiscate" enemy property (Br. Opp. 18) but of statutory authority to take by "supervisory" rather than "vesting" order. We have shown (Pet. 12-16) that the statute cannot be construed to authorize the taking of *any* property by supervisory order.

2) Respondent urges that at the time the Directive issued petitioner was an enemy,[4] that no "enemy could challenge the Attorney General's action even if it were unauthorized", and that petitioner stands no higher now than it did then (Br. Opp. 17-18). The law goes no further than this: the United States may seize and confiscate

---

[4] Respondent goes even further, saying that

"Petitioner could also *still* be treated as a 'national' of Germany because 'on or since' June 14, 1941, a substantial part of its stock was German-owned * * *" (Br. Opp. 14, fn. 12).

In other words, the 100% American puchasers of shares from him are exposed to the perpetual risk that the corporate assets may be vested or "frozen" on the ground that the corporation remains an enemy. Congress contemplated no such irrational perpetuation of wartime controls; it did not, indeed it could not, leave American investors who bought from respondent forever at his mercy. From the outset Congress was assured that Americans were untouched by the Act (Pet. Appendix B).

enemy property and no enemy may *bring* suit under §9 of the Act to recover it. But this is not a suit *by* an enemy; it is a suit by respondent for specific performance *against* an "enemy". An enemy is expressly authorized to *defend* and in defending to set up the lawlessness of official action (Pet. 20). The Act did not deliver enemies to the "unfettered discretion" of administrators. To the contrary,

> "the Trading with the Enemy Act was never intended, without Presidential proclamation [here absent] to affect resident aliens at all." *Ex parte Kumezo Kawato*, 317 U.S. 69, 76.

3) Next respondent argues that petitioner seeks to have the Court declare the "supervisory" power unconstitutional in the interest of an absent class, Americans whose property may not be taken (Br. Opp. 18-19). Not at all. The scope of the supervisory power presents a question of *construction* of §5(b)—whether property may be taken under the supervisory power. In construing a statute courts often consider whether a given interpretation will conduce to unreasonable results (cf. *United States* v. *Ryan*, 284 U.S. 167, 175) or will thwart the legislative intention. For example, here the Court will note that the power to take enemy property is already conferred by the vesting clause; it may then ask whether it should read a superfluous duplication of that power into the supervisory clause when to do so will both lead to unreasonable results—the taking of American interests—and balk the Congressional intention to protect Americans from such action.

4) All respondent's talk that petitioner was an enemy at the time of the Directive obscures the fact that respondent was then the sole shareholder and that the American purchasers from him are now the real parties in interest. If he chooses to identify the corporation with himself, there was no contract for he could not contract with himself. *Re H. Hicks & Son*, 82 F. (2d) 277, 279. If he insists on the separate entity, then he was under a

duty to comply with New Jersey corporate law and federal law, particularly because he issued the Directive in contemplation of a sale of his shares to the American public. (Br. Opp. 7, 24). Instead, relying on what the Securities & Exchange Commission has termed "the perennial faith, trust and innocence of investors",[5] respondent first illegally coerced the directors to give the patents to him and to bind the future shareholders down the years, and then unloaded the corporation thus shorn of its patents on an unsuspecting public. Now he would bar the American shareholders who bought from him from making the defense that his action was unauthorized by statute. It bears repeating that he himself said that

> "when the contract is entered into with a corporation with a view to a contemplated sale of its stock, the interests of the corporation may be *measured after* the sale *by the interests of the third parties* into whose hands the stock passes." (Pet. 9-10)[6]

The Directive and Agreement were designed to bind those "third parties" down the years and it would be a reproach to the law if they could not be heard to defend against official lawlessness aimed directly at them. No such result is required by statute or cases.

5) Respondent would transmute our demonstration that the statute bars a taking by supervisory order into insistence that the "Attorney General use one particular set of words or one particular form of order * * *" (Br. Opp. 19). But it was respondent and his predecessors who themselves blazed the trail. For ten years, more than 14,000 transfers of title and possession were accomplished by vesting orders, never by supervisory order or direc-

[5] *8 SEC Protective Comm. Study*, 289 (1940).

[6] Respondent now would soften the impact of this concession by confining the "third parties" to "the brokers who bought from the Attorney General" (Br. Opp. 24-25, fn. 19). But his brief in the court below (p. 37) urged that the Agreement bound the "new or subsequent stockholders"; and it was known to all that the brokers were, as usual, merely a conduit for immediate distribution to the public.

tive. In the vesting orders the administrators employed words drawn from the vesting clause, which unquestioningly authorizes *vesting* of enemy property. When respondent employs words drawn from the "supervisory" clause, it must be presumed that he is acting under the "supervisory" power and a demonstration that it does not in fact authorize a taking or compulsory transfer proves a lack of authority, not a mere insistence on labels.

6) Respondent rejects our assertion that

> "all transfers of title and possession to the Custodian have been effected by vesting orders",

saying that

> "In a sizeable number of cases the transfer has been accomplished by a 'turn-over directive'" (Br. Opp. 20).

The cases he cites are all instances of "turn-over directives" which direct the delivery of property *earlier vested* by vesting order, as is confirmed by the standard "turn-over directive" attached to our Petition as Appendix C. That standard "form" is addressed to a specific vesting order; it describes the property thereby vested and directs that the "said property" be "turned-over" to the Custodian. "The same procedure", says respondent, "was followed in the instant case" (Br. Opp. 20). Respondent's Directive did not order petitioner to *turn-over* patents already vested; it ordered petitioner *to execute an agreement to assign* the patents.[7] If the patents were already vested by V.O. 18685, it was entirely unnecessary to coerce petitioner to assign them.

---

[7] The Directive in suit (App. 200a) enumerates all of the prior vesting orders, which, but for V.O. 18685 (inadvertently overlooked by us), had long before been implemented, and recites a determination that certain patents shall *"be transferred"*—an admission that title thereto had not theretofore been vested or transferred. Thereafter, it states that "the aforesaid determination [that a transfer shall be made] *may be accomplished* by the execution and performance of an *agreement*" (App. 201a) to "assign" said patents and then directs petitioner "to execute" said agreement.

Thus respondent's Directive was not designed to implement a prior vesting order but was an independent invocation of the supervisory power to "compel" execution of an agreement to transfer certain patents and to license others. Were the Directive like his standard "turn-over directive", respondent could have had the far simpler, time-honored suit for enforcement of vesting order and turn-over directive under §17 of the Act instead of a suit for specific performance under an agreement void for duress. In such suit, however, petitioner would have been entitled to call upon respondent for proof that German Schering had *any* "right, title and interest" in the patents. For all that V.O. 18685 took was that "right, title and interest" (App. 137a), and it is settled that a defendant in such enforcement suit is entitled to have the court determine the quantum, if any, of alleged enemy ownership.[8] In fact, Schering A.G. had no "interest" in petitioner's patents as petitioner could have proven had the issue been raised in the district court and, should the point become important, is even now entitled to prove. Vesting Order 18685 was merely a final pre-

---

[8] *Kahn* v. *Garvan*, 263 Fed. 909, 912; *Clark* v. *Edmunds*, 73 F.Supp. 390, 393; *McGrath* v. *Ward*, 91 F.Supp. 636, 638.

Respondent suggests that a "turn-over directive" has "the effect of a *res* vesting", i.e. a taking of the entire res rather than the enemy's particular interest therein (Br. Opp. 20). But his standard "turn-over directive" does not attempt to enlarge the scope of the vesting order to which it is addressed; it merely directs a turn-over of the property that "was vested * * * by said vesting order" (App. C. to Pet.). Given the necessity for publication of vesting orders in the Federal Register, quere whether a vesting order can be enlarged by a turn-over directive.

The distinction between a "right, title and interest" vesting and a "res" vesting was noted in *Zittman* v. *McGrath*, 341 U.S. 446, 463-464. In the companion case, *Zittman* v. *McGrath*, 341 U.S. 471, 472, the "turnover directive" described "the specific property which he required to be 'turned over * * *'" and the Court later said that in that case "the *vesting order specifically vested debts* owned to a foreign national * * *", *Brownell* v. *Singer*, 347 U.S. 403, 406-407, i.e. the vesting order itself vested the res or debt, not merely a foreigner's "right, title and interest" therein.

cautionary measure to cut off remotely possible claims of the German parent to its subsidiary's patents, as was done by the parallel vesting of the German parent's possible rights in petitioner's good will, trade-names and trade-marks, which respondent assigned to petitioner for $10 (App. 34a).[9]

7) Respondent also rests his Directive on his "duty to administer" the vested *shares* (Br. Opp. 16). But in "administering" those shares he stood no higher than any other shareholder. *Federal Sugar Refining Co.* v. *United States Sugar Equalization Bd.*, 268 Fed. 575, 584; *Sutherland* v. *Selling*, 16 F.(2d) 865, 868; cf. *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907-908. New Jersey law, which is controlling, forbids shareholders to constrain the exclusive discretion of the directors (Pet. 11, fn. 10), a limitation which is not obstructive since respondent could have elected directors who shared his views. *Securities & Exchange Comm.* v. *Transamerica Corp.* 67 F.Supp. 326, 330.

## IV

### The Supervisory Clause Is Unconstitutional Because There Is No Remedy Against a Supervisory Order

The directors had a remedy, respondent first argues, because they could have sued for the "old" patents (which were assigned to him by the coerced Agreement) under §9 of the Act (Br. Opp. 21). But §9 is open only to one claiming an "interest, right or title in" vested property and the directors had no such interest. Elsewhere respondent shows that the interests of the directors "rise no higher than those of the corporation" (Br. Opp.

[9] V.O. 18685 is confined by respondent himself (Br. Opp. 20) to the "old" patents, those originated "prior to April 18, 1942" (id. at 8, fn. 9). Schering A. G. could have no interest in the "new" patents originated after that date when petitioner was under the Custodian's control. For those patents, respondent must invoke a power to order an enemy to transfer his property to third persons rather than to the government (Pet. 10-11), a power never before claimed or exercised, even in the heat of war.

22); an "enemy" corporation is barred from suit by the terms of §9 (cf. Br. Opp. 18). Respecting the "new" patents, which petitioner was directed to license to third persons, respondent argues that no remedy is necessary because the directors have no greater right than the corporation and that it, as an enemy, had no right to sue (Br. Opp. 22). In short, the directors were and are confessedly without a statutory remedy both for the wrong done to themselves and that done to the future shareholders.

Respondent thinks it "obvious" that in order to "compel" corporate action by an "enemy corporation" he "must have the authority to override the discretion of directors" (Br. Opp. 22). It is an authority which he and his predecessors, for upwards of ten years, got along famously without (cf. Pet. 15), and which his power to elect new directors renders superfluous. But assume the need for such *authority*, there must yet be a right to *judicial review* to shield a dissident from unlawful imprisonment or else we are in the realm of Stalin and Beria. An American does not become an outlaw upon becoming a director of a former enemy-owned corporation. Whether respondent's "authority" extends to coercion of an American to act contrary to his conscience and judgment on threat of imprisonment should at least be subject to judicial review. The best respondent can muster is "the classic remedy of a suit for an injunction" to restrain action in "excess of statutory authority" (Br. Opp. 23). He studiously ignores both his own conversion of that remedy to a useless wild-goose chase in the *Land* v. *Dollar* proceedings and this Court's insistence on provision for a statutory suit against the United States where a statute impinges upon fundamental rights (Pet. 18-19).[10]

---

[10] Respondent accuses us of conjuring up the "specter" of "unlimited and unreviewable 'freezing' or 'blocking' * * *" (Br. Opp.

## V

## As a Matter of Equity, Respondent Is Not Entitled to Relief

A "matter of equity" is invoked by respondent to support the judgment below (Br. Opp. 23). He does not controvert that "disclosure" in the prospectus that the corporation had been deprived of its patents presumably did not reach the purchasing investors. Instead he argues that the brokers who bought from him knew, that the purchasers from them are bound by their knowledge (Br. Opp. 24-25) and that the corporation "is bound by the Agreement executed at the behest of its sole stockholder" (id. at 25). What equity is presented by the spectacle of a sole stockholder who first stifles the only free voice—that of the directors—that could be raised on behalf of the future shareholders and then strips the corporation of its patents in contemplation of the sale of its shares, secure in the knowledge that the public was highly unlikely to learn of the "disclosure" that he made to the "brokers" for the sale.[11]

---

22). But he himself boasts that on January 29, 1942, the government

> "suspended the then President of Schering and seven other officials and barred them from the premises" (Br. Opp. 4, fn. 4)

a practice in which the government confessedly engaged in "innumerable instances" (Pet. 17). In weighing the actual and "unreviewable" invasion of fundamental rights in this case, this Court may consider that what has gone before is but a prologue to what is to come.

[11] Even where unthinking shareholders have ignored a complete disclosure which *reached them* in the form of proxy statements and approved a rigged deal, a court has set the transaction aside as a betrayal of fiduciary duty owed to stockholders by controlling interests. *Kahn* v. *Schiff*, 105 F.Supp. 973, 976. In essence, respondent would estop the shareholders because he sold his stock to them in reliance on the Agreement, as the district court held (App. 227a-228a). But they cannot be estopped from repudiating an agreement made under his compulsion. *Becker* v. *Miller*, 7 F. (2d) 293, 295; cf. *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F.(2d) 253, 259; *The Arrogante Barcelones*, 7 Wheat. 496, 518.

## CONCLUSION

On one theory or another, respondent seeks to foreclose review on the ground that an "enemy" cannot complain of unauthorized action, maintaining, in essence, that the end justifies the means. But administrators must employ the means supplied by Congress. Lawless administrative action against "enemies", if insulated from review today, will encourage administrative lawlessness against Negroes, Japanese or Catholics tomorrow. Recent events have underscored the wisdom of Mr. Justice Douglas' statement that

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion).

Respectfully submitted

JOHN MILTON

RAOUL BERGER

*Attorneys for Petitioner*

*Of Counsel:*

MILTON, MCNULTY & AUGELLI

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY

IRVING H. JUROW

May 18, 1956